**KHAW POH CHHUAN**

**v.**

**NG GAIK PENG (F) & YAP WAN CHUAN & 9 ORS.**

SUPREME COURT, KUALA LUMPUR
TAN SRI DATO' HJ. MOHD. AZMI KAMARUDDIN FCJ
DATO' PEH SWEE CHIN FCJ
DATUK CHONG SIEW FAI CJ (SABAH & SARAWAK)
[CIVIL APPEAL NO. 02-239 OF 1992]
20 JANUARY 1996

***CONTRACT:*** *Assignment - Beneficial interest in estate of intestate - Whether valid - Proper construction - Whether assignment absolute and unconditional - Whether void for uncertainty - Section 4(3) Civil Law Act 1956 - Compliance thereof - Whether a necessary pre-requisite - Civil Law Act 1956 s. 4(3) - Probate and Administration Act 1956 s. 60.*

***LAND LAW:*** *Caveat - Validity - Whether could be challenged laterally - Transfer of land - Transfer registered in violation of caveat - Whether could be set aside - Whether voidable - Indefeasibility of title - Whether could be pleaded by transfree - Proper and just order - Injustice to transfree purchaser - Whether a material consideration - National Land Code ss. 340, 432.*

***PROBATE & ADMINISTRATION:*** *Estate of intestate - Assignment of beneficial interest - Distribution of residuary assets - Assignor a residuary beneficiary and co-administrator of estate - Assignor assigning interests in estate to assignee - Whether assignee a residuary beneficiary - Whether could sue other beneficiaries - Administration of estate - Completion of administration - Whether necessary before any beneficial right could accrue to assignee - Duty of administrator.*

***PROBATE & ADMINISTRATION:*** *Estate of intestate - Distribution of residuary assets - Consent order - Setting aside - Interest of residuary beneficiary - Consent order brushing aside interests of residuary beneficiary - Whether could be set aside - Whether there was a good cause of action - Appropriate remedies - Whether Court could grant any relief not inconsistent with reliefs expressly sought for.*

***WORDS & PHRASES:*** *"Until the estate is fully administered".*

In 1964 and 1965 the appellant (the assignee) entered into two separate agreements with one Yap Ah Looi (the assignor). By the agreements, the assignor purported to sell and assign to the assignee, for a consideration of RM15,000, all her interests in the estates of her father (the deceased father) and her mother (the deceased mother), comprising in the main of 4 pieces of

land. The deceased mother, whose estate consisted of a beneficial interest in the deceased father's estate, was one of the deceased father's two widows.

The facts showed that in 1960, upon the death of the deceased mother, letters of administration *de bonis non* in respect of the estates were granted to the assignor and her co-administrator. In 1965, after the agreements were executed, the assignor and the co-administrator filed an originating summons to distribute the assets amongst the beneficiaries. In the proceedings the assignor made admission about the asssignment of her interests to the assignee, but the summons was never pursued and was eventually withdrawn. It was evident that at about this time a caveat against the 4 pieces of land had been lodged by the assignee.

The assignor was one of the beneficiaries of the estate of the deceased father, the others being her own siblings. In 1973, following an application to Court (by Originating Summons No. 209/73) by the three children of the other widow (the 2nd, 3rd and 4th respondents herein) for an administration action, all the beneficiaries of the deceased father's estate, including the assignor, came to a family settlement agreement, whereby they sought to distribute the assets according to the provisions of the Distribution Act 1958. In essence, the agreement provided for the sale of 3 of the 4 pieces of land to the 6th, 7th, 8th and 10th respondents, all of whom were beneficiaries, and the 4th piece (EMR 5614) to the 9th respondent, Tan Chong Motor Company Sdn. Bhd. (Tan Chong). This settlement agreement, however, brushed aside totally the interests of the assignee. Be that as it may, on 24 December 1973, upon the application of the 2nd to the 4th respondents, the Court made a consent award in terms of the family settlement agreement, unaware of the interests of the assignee.

Following the consent order, the assignor and her co-administrator entered into an agreement to sell EMR 5614 to Tan Chong for RM900,000. In 1977 the transfer was registered notwithstanding the fact that the caveat of the assignee remained intact and was still on the Register. The assignee's protest to the Land Administrator proved futile, and thereupon, the assignee filed the present action wherein he sought, *inter alia*, for declarations that the consent order and the family settlement agreement were void and be set aside, and that he was entitled to 81/630 undivided share in each of the 4 pieces of land being the total resulting share of the asssignor in the intestate estate of the deceased father. The assignor herself, as it was, died in 1988.

The learned Judge, dismissing the application, ruled that the assignment, being non-absolute and conditional, had contravened s. 4(3) of the Civil law Act 1956, and so, was void and invalid, that the assignment was also void for uncertainty, and that the assignee, in any case, had no cause of action against the respondents. According to the Judge further, the caveat as lodged by the assignee was invalidly registered and could not, therefore, stand. The appellant appealed and before the Supreme Court the primary issues that arose were:

1. Whether the assignment agreements herein, upon their proper construction, had given rise to an absolute and therefore valid assignment.

2. Whether in the circumstances, the transfer of EMR 5614 to Tan Chong was void or voidable, and in any case, whether, bearing in mind the circumstances of the transfer, it was open for Tan Chong to plead indefeasibility.

3. Whether the consent order and the family agreement ought to be set aside.

4. Whether the assignee had a good cause of action against the respondents.

**Held:**

**Per Peh Swee Chin FCJ (delivering the judgment of the Court):**

**[1]** The test of an absolute assignment should normally be whether the interest as claimed had been transferred unconditionally to the assignee and placed completely under the assignee's control. A fair reading of clause 1 of the agreement dated 1 April 1964 leads to the conclusion that such interests and rights as sold, transferred and assigned by the assignor, pass absolutely under this clause, and that the passing of such interests are not dependent on other terms of that agreement. The assignment here is therefore absolute, and the Judge below was in error in holding that it was non-absolute or conditional. For these same reasons, the Judge's finding that the assignment was void for uncertainty was also flawed.

**[2]** The subject matter of the assignment is a chose in action and not the lands as such. Therefore, the agreements in question cannot be treated in law as agreements to buy and sell land or parts of such land. The assignment is therefore valid or rather not invalid by reason of uncertainties, if at all, as mentioned by the Judge.

**[3]** Since the assignment is absolute and in writing, and since notice of the assigment had been given to the debtors, there was due compliance with s. 4(3) of the Civil Law Act. Be that as it may, compliance with s. 4(3) is not a prerequisite to the validity of an assignment, which is to be determined in the usual ways. Even without complying with s. 4(3), i.e without notice of assignment to such debtors, the assignment would have been valid in equity against the assignor. Section 4(3) has not altered the law of assignment but merely made it easier for the assignee in one aspect, in that the assignee can sue in his own name without sometimes having to borrow the name of the assignor, or to join the assignor as co-defendant if the assignor is un-cooperative.

**[4]** The Judge was right in concluding that until the estate is fully administered, a residuary beneficiary such as the assignee does not have any interest, legal or equitable, in the assets of the estate of the intestate. However,

an estate is said to be fully administered after the administrator has satisfied all testamentary expenses and debts.

**[5]** Contrary to the conclusion of the Judge, the assignee clearly had a good cause of action. By the family settlement agreement, all the beneficiaries had agreed to distribute the estate, by giving the 3 pieces of land to the relevant residuary beneficiaries in satisfaction of claims of residuary beneficial shares, and by selling the 4th piece to Tan Chong the proceeds which to be distributed among the beneficiaries. This being the case, at the time the assignee filed the present action the administration could be said to have been completed.

**[6]** The validity or voidness of a caveat can only be raised in proceedings in accordance with the procedure of the National Land Code for it removal or continuance, as the case may be. In other words, the validity of such caveat can only be challenged in the proceedings instituted for the purpose in accordance with the procedure laid down in the Code, and not in any proceeding laterally.

**[7]** The effect of a dealing registered by the registering authority in violation of the caveat on the Register is that, the transfer can be challenged with a view to having the transfer set aside. Such a transaction is devoid of the protection of indefeasibility of title which would have been normally acquired. The transfer, however, is not wholly void *ab initio* by virtue of the violation but "voidable" in proceedings instituted for the purpose. In any case, bearing in mind that the setting aside of the transfer did not by itself put an end to the dispute between the caveator and the caveatee, the *status quo* before the presentation of the transfer in violation of the caveat should be restored *ex debitio justitiae* on the mere fact of such violation on a motion to Court without the necessity to explore the underlying transaction between the parties.

**[8]** A perfected consent order can only be set aside in a fresh action filed for the purpose. In this case the assignee has done just that when the said consent order, given in Originating Summons No. 209/1973, was sought to be set aside in a separate subsequent civil suit with which this appeal is now concerned. The assignee, however, is not a party to the said originating summons. The question was whether the assignee could claim such a relief.

**[9]** The assignee should have been made a party to the said family settlement agreement and in Originating Summons No. 209/73 in place of the assignor who deliberately disowned the assignment. All the other parties were aware of the assignment because of another previous originating summons which was filed for distribution of the assets of the deceased father in accordance with the Distribution Act 1958. All such parties chose to treat the assignee as non-existent and to dispose of the interest of the assignee without his

knowledge and consent. In such circumstances, this Court has to hold that the assignee has the *locus standi* to claim the relief of setting aside the consent order.

**[10]** The Court has the power to interfere with a consent order where grave injustice would be caused by allowing the consent order to remain. It is well settled that a consent order can be set aside not only on ground of fraud but also on those same grounds on which an agreement may be set aside. The first requisite of a contract is that parties should have reached agreement which would involve an offer and acceptance of the offer. In this case the assignee had never reached such agreement with all the parties to the family settlement agreement which purported to dispose of his beneficial interest without his knowledge and consent. Thus, not only that the agreement is not binding on the assignee because he was not party to it, but it also attempted to dispose of his interest, to be backed apparently by the sanctity of a consent order of the Court. A situation of grave injustice was thus caused to the assignee by the agreement. The family settlement agreement, in the premises, ought to be set aside.

**[11]** Notwithstanding the aforesaid, in the circumstances here, the setting aside of the family settlement agreement is fraught with serious impediment by reason of the fact that, pursuant to the consent order, Tan Chong had bought and had been registered as proprietor of EMR 5614, albeit in highly controversial circumstances. The consent order, if set aside, would clearly cause prejudice to Tan Chong. Thus, while the family settlement agreement, undoubtedly, ought to be set aside, justice of the case requires that that part of the consent order as providing leave to sell that piece of land under EMR 5614 ought to be retained. This is also consonent with the principle that an administrator has exclusive right to decide to sell or not to sell any land in the course of his duty of administration of the estate of the deceased person.

**[12]** The assignee's proportion of 81/630 share has not been seriously disputed by the parties. This Court will therefore accept this proportion as correct and relief in this respect is granted. A Court may however grant other relief as required by the justice of the case. In the circumstances here, other appropriate orders ought to be made as well.

*[Appeal partly allowed. Appropriate consequential orders made]*

***[Bahasa Malaysia** Translation of Headnotes]*

***KONTRAK:** Serahanhak - Kepentingan benefisial dalam harta pesaka tak berwasiat - Samada sah - Pentafsiran wajar - Samada suatu serahanhak yang muktamad dan tidak bersyarat - Samada terbatal kerana ketidak-pastian - Seksyen 4(3) Akta Undang-undang Sivil 1956 - Pematuhan -*

*Samada suatu pra-syarat yang diperlukan - Akta Undang-undang Sivil 1956 s. 4(3) - Akta Probet dan Pentadbiran 1956 s. 60.*

***UNDANG-UNDANG TANAH:*** *Kaveat - Keesahan - Samada boleh dicabar secara sisian - Pemindahan tanah - Pemindahan didaftarkan dalam perlanggaran kaveat - Samada boleh diketepikan - Samada boleh menjadi tak sah - Hakmilik tak boleh disangkal - Samada boleh diplid oleh penerima pindahan - Perintah wajar dan adil - Ketidakadilan kepada pembeli yang menerima pindahan - Samada suatu pertimbangan yang material - Kanun Tanah Negara, ss. 340, 432.*

***PROBET & PENTADBIRAN:*** *Harta pesaka tak berwasiat - Penyerahanhak kepentingan benefisial - Pembahagian aset-aset bakian - Penyerahhak merupakan benefisiari bakian dan pentadbir bersama - Penyerahhak menyerahhak kepentingan dalam harta pesaka kepada pemegang serahhak - Samada pemegang serahhak menjadi benefisiari bakian - Samada boleh mendakwa benefisiari-benefisiari lain - Pentadbiran harta pesaka - Penyempurnaan pentadbiran - Samada perlu sebelum apa-apa hak benefisiari boleh terakru kepada pemegang serahhak - Kewajipan pentadbir.*

***PROBET & PENTADBIRAN:*** *Harta pesaka tak berwasiat - Pembahagian aset-aset bakian - Perintah persetujuan - Pengenepian - Kepentingan benefisiari bakian - Perintah persetujuan mengenepikan kepentingan benefisiari bakian - Samada boleh diketepikan - Samada wujud kausa tindakan yang baik - Remedi-remedi wajar - Samada Mahkamah boleh memberikan apa-apa relief yang tidak bertentangan dengan relief yang dipohon secara nyata.*

***PERKATAAN & ISTILAH:*** *"Sehingga harta pesaka telah ditadbirkan sepenuhnya".*

Dalam tahun-tahun 1964 dan 1965 perayu (pemegang serahhak) yang memasuki dua perjanjian yang berasingan dengan seorang yang bernama Yap Ah Looi (penyerahhak). Melalui perjanjian-perjanjian tersebut, penyerahhak telah menjual dan menyerahhak kepada pemegang serahhak untuk satu balasan sebanyak RM15,000, kesemua kepentingannya dalam harta pesaka bapa (mendiang bapa) dan ibunya (mendiang ibu) yang terdiri, sebahagian besarnya, daripada 4 bidang tanah. Mendiang ibu, yang mana harta pesakanya terdiri daripada kepentingan benefisial dalam harta pesaka mendiang bapa, adalah salah seorang dari dua orang balu mendiang bapa.

Fakta menunjukkan bahawa dalam tahun 1960, setelah kematian mendiang ibu, surat-surat pentadbiran *de bonis non* berhubung dengan harta pesaka tersebut telah diberikan kepada penyerahhak dan pentadbir-bersamanya. Dalam tahun 1965, selepas perjanjian-perjanjian tersebut di atas disempurnakan, penyerahhak dan pentadbir-bersama telah memfail satu saman pemula untuk membahagi aset-

aset di antara benefisiari-benefisiari. Dalam prosiding tersebut penyerahhak telah membuat pengakuan mengenai serahanhak kepentingannya kepada pemegang serahhak, tetapi saman tersebut tidak diteruskan dan telah akhirnya ditarik-balik. Adalah jelas bahawa lebihkurang pada waktu yang sama, satu kaveat terhadap 4 bidang tanah tersebut telah diserah-simpan oleh pemegang serahhak.

Penyerahhak adalah seorang benefisiari harta pesaka mendiang bapa, manakala benefisiari-benefisiari yang lain adalah adik beradiknya. Dalam tahun 1973, berikutan satu permohonan kepada Mahkamah (melalui Saman Pemula No. 209/73) oleh ketiga anak balu yang lain itu (responden ke2, ke3, dan ke4 di sini) untuk satu tindakan pentadbiran, kesemua benefisiari harta pesaka mendiang bapa, termasuk penyerahhak telah mencapai satu perjanjian penyelesaian keluarga, dimana mereka bersetuju untuk membahagi aset-aset tersebut menurut peruntukan Akta Pembahagian 1958. Secara pentingnya, perjanjian ini memperuntukkan penjualan 3 daripada 4 bidang tanah kepada responden ke6, ke7, ke8, dan ke10, kesemuanya merupakan benefisiari, dan bidang tanah yang keempat (EMR 5614) kepada responden ke9, Tan Chong Motor Company Sdn. Bhd. (Tan Chong). Perjanjian penyelesaian ini, bagaimanapun, mengenepikan sama sekali kepentingan pemegang serahhak. Walaupun begitu, pada 24 Disember 1973, atas permohonan responden ke2 hingga ke4, Mahkamah telah membuat perintah persetujuan menurut terma-terma perjanjian penyelesaian keluarga tersebut, tanpa menyedari kepentingan pemegang serahhak.

Berikut perintah persetujuan di atas, penyerahhak dan pentadbir-bersamanya memeterai perjanjian di mana mereka menjual EMR 5614 kepada Tan Chong dengan harga RM900,000. Pada tahun 1977 pindahmilik EMR 5614 kepada Tan Chong telah didaftarkan, walaupun pada ketika itu kaveat yang dimasukkan oleh pemegang serahhak masih kekal dan masih wujud di atas Daftar. Pemegang serahhak telah membuat bantahan kepada Pentadbir Tanah tetapi tidak berhasil, dan ekoran itu, beliau memfail tindakan sekarang di mana beliau memohon, antara lain, perisytiharan bahawa perintah persetujuan keluarga di atas adalah tak sah dan harus diketepikan, dan bahawa beliau berhak kepada 81/630 bahagian ke atas tiap-tiap bidang tanah berkenaan, ia itu bahagian dalam harta pesaka mendiang bapa yang terakru kepada penyerahhak. Sepertimana yang terjadi penyerahhak telah meninggal dunia pada tahun 1988.

Permohonan pemegang serahhak telah ditolak oleh Hakim yang bijaksana yang memutuskan bahawa serahanhak yang dikatakan itu adalah tak sah kerana ianya suatu serahanhak yang bersyarat dan tidak muktamad dan dengan itu telah melanggari s. 4(3) Akta Undang-Undang Sivil 1956. Diputuskan juga bahawa serahanhak tersebut juga batal kerana ketidak-pastian, dan bahawa pemegang serahhak tidak mempunyai kausa tindakan terhadap responden. Menurut Hakim selanjutnya, kaveat sepertimana yang telah diserahsimpan oleh pemegang serahhak telah didaftarkan secara tak sah dan dengan itu, tidak dapat dipertahankan. Perayu telah merayu dan dihadapan Mahkamah Agung isu-isu yang telah berbangkit adalah:

1. Samada perjanjian-perjanjian serahanhak disini, di atas pentafsirannya yang betul, telah membangkitkan satu serahanhak yang mutlak dan dengan itu sah.

2. Samada dalam keadaan disini, pemindahan EMR 5614 kepada Tan Chong adalah tak sah atau boleh menjadi batal, dan walauapapun, samada, mengambil kira halkeadaan di mana pindahmilik berkenaan dilaksanakan, ianya terbuka bagi Tan Chong untuk memplid hakmilik tak boleh disangkal.

3. Samada perintah persetujuan dan perjanjian keluarga harus diketepikan.

4. Samada pemegang serahhak mempunyai kausa tindakan yang baik terhadap responden.

**Diputuskan:**

**Oleh Peh Swee Chin HMP (menyampaikan penghakiman Mahkamah):**

**[1]** Ujian serahanhak mutlak selalunya menurut kebiasaan adalah samada kepentingan sepertimana yang telah dituntut telah dipindahmilik dengan cara yang tidak bersyarat kepada pemegang serahhak dan terletak sepenuhnya di bawah kawalan pemegang serahhak. Mentafsir dengan teliti fasal 1 perjanjian bertarikh 1 April 1964 membawa kepada rumusan bahawa hak-hak dan kepentingan sedemikian sepertimana yang telah dijual, dipindahmilik dan diserahhak oleh penyerahhak, telah berpindah secara mutlak dibawah fasal ini, dan bahawa pemindahan kepentingan tersebut tidak bergantung atas terma-terma lain perjanjian itu. Penyerahanhak disini dengan itu adalah mutlak, dan Hakim di bawah adalah salah dalam memutuskan bahawa ianya tak mutlak atau bersyarat. Atas sebab-sebab yang sama, pendapat Hakim bahawa serahanhak di sini tak sah kerana tiada kepastian adalah juga cacat.

**[2]** Tajuk atau hal perkara serahanhak di sini adalah suatu hak dalam tindakan dan bukannya tanah-tanah tersebut dalam sifatnya yang sedemikian. Dengan itu, perjanjian-perjanjian yang dipersoalkan tidak boleh dianggap di sisi undang-undang sebagai perjanjian untuk membeli dan menjual tanah atau bahagian-bahagian tanah tersebut. Serahanhak berkenaan adalah dengan itu sah, atau lebih tepat lagi bukanlah tak sah oleh kerana ketidakpastian sepertimana yang dikatakan oleh Hakim.

**[3]** Oleh kerana serahanhak di sini mutlak dan bertulis, dan oleh kerana notis mengenai penyerahhakan itu telah diberikan kepada penghutang, maka pematuhan terhadap s. 4(3) Akta Undang-Undang Sivil telah pun berlaku. Biarpun begitu, pematuhan kepada s. 4(3) bukanlah satu pra-syarat kepada keesahan sesuatu serahanhak, yang mana haruslah ditentukan menurut cara-caranya yang biasa. Walaupun tanpa pematuhan terhadap s. 4(3), iaitu tanpa memberikan notis serahanhak kepada penghutang, serahanhak itu akan tetap sah terhadap penyerahhak menurut ekuiti. Seksyen 4(3) tidak

mengubah undang-undang serahanhak tetapi hanya menjadikannya lebih mudah bagi pemegang serahhak dalam satu aspek, iaitu pemegang serahhak boleh mendakwa atas namanya sendiri tanpa kadangkala terpaksa meminjam nama penyerahhak, ataupun menyertakan penyerahhak sebagai defendan bersama jika penyerahhak tersebut tidak bekerjasama.

**[4]** Hakim tersebut adalah dalam memutuskan bahawa sehingga harta pesaka itu ditadbirkan dengan sepenuhnya, benefisiari bakian seperti pemegang serahhak tidak mempunyai apa-apa kepentingan, mengikut undang-undang atau ekuiti, dalam aset-aset harta pesaka simati tak berwasiat. Walaubagaimanpun sesuatu harta pesaka dikatakan telah menjelaskan kesemua perbelanjaan-perbelanjaan perwasiatan dan hutang-hutang.

**[5]** Bercanggah dengan keputusan Hakim, pemegang serahhak jelas mempunyai kausa tindakan yang baik. Melalui perjanjian penyelesaian keluarga tersebut, kesemua benefisiari telah bersetuju untuk membahagikan harta pesaka tersebut, dengan memberikan 3 bidang tanah kepada benefisiari bakian yang relevan sebagai ganti tuntutan benefisial mereka, dan dengan menjual tanah yang ke4 kepada Tan Chong, hasil yang mana akan dibahagikan dikalangan benefisiari-benefisiari. Dalam keadaan sedemikian, pada waktu pemegang serahhak memfailkan tindakan semasa ini, pentadbiran boleh dikatakan telah disempurnakan.

**[6]** Keesahan atau ketidak-sahan sesuatu kaveat hanya boleh dibangkitkan dalam prosiding menurut prosedur Kanun Tanah Negara untuk pembatalannya atau pun bagi meneruskannya, menurut mana yang berkenaan. Dalam ertikata lain, keesahan kaveat yang sedemikian hanya boleh dicabar dalam prosiding yang dimulakan bagi tujuan tersebut menurut prosedur yang dibentangkan dalam Kanun tersebut, dan tidak dalam mana-mana prosiding sisian.

**[7]** Kesan sesuatu urusan yang didaftarkan oleh pihak berkuasa yang mendaftar dengan melanggari kaveat di atas Daftar adalah bahawa, pindahmilik itu boleh dicabar untuk tujuan mengenepikannya. Transaksi yang sedemikian tidak mempunyai perlindungan hakmilik tak boleh disangkal, yang mana pada kebiasaannya mungkin diperolehi. Pindahmilik tersebut, namun begitu, tidak terus menjadi tak sah *ab initio* atas perlanggaran itu tetapi "voidable" (boleh batal) dalam prosiding-prosiding yang dimulakan bagi tujuan tersebut. Bagaimanapun, mengambil kira bahawa pengenepian pindahmilik di sini tidak dengan sendirinya menamatkan pertikaian antara pengkaveat dan penanggung kaveat, *status quo* sebelum pengemukaan pindahmilik harus dipulihkan kembali *ex debitio justitiae* atas fakta-fakta perlanggaran tersebut dengan satu usul kepada Mahkamah tanpa keperluan untuk menyelidik transaksi disebaliknya antara pihak-pihak terbabit.

**[8]** Satu perintah persetujuan yang terlaksana hanya boleh diketepikan dalam satu tindakan baru yang difailkan bagi tujuan itu. Dalam kes ini, pemegang serahhak telah melakukan yang sedemikian bilamana perintah persetujuan tersebut, yang diberi dalam Saman Pemula No. 209/73, telah dipohon untuk diketepikan dalam satu guaman sivil berikutan yang berasingan yang mana rayuan ini adalah kini berkaitan. Pemegang serahhak, namun begitu, bukannya merupakan satu pihak kepada saman pemula tersebut. Persoalannya adalah samada pemegang serahhak boleh menuntut relief untuk mengenepikan itu.

**[9]** Pemegang serahhak seharusnya dijadikan satu pihak kepada perjanjian penyelesaian keluarga dan dalam Saman Pemula No. 209/73 bagi menggantikan penyerahhak yang telah dengan sengaja menolak pengetahuan mengenai penyerahanhak tersebut. Kesemua pihak yang lain mengetahui tentang serahanhak tersebut disebabkan saman pemula terdahulu yang telah difailkan untuk pembahagian aset-aset mendiang bapa menurut Akta Pembahagian 1958. Kesemua pihak-pihak yang sedemikian namun begitu memilih untuk menganggap pemegang serahhak sebagai tidak wujud dan untuk melupuskan kepentingan pemegang serahhak tanpa pengetahuan serta persetujuannya. Dalam keadaan sedemikian, Mahkamah perlu memutuskan bahawa pemegang serahhak mempunyai *locus standi* bagi menuntut relief mengenepikan perintah persetujuan tersebut.

**[10]** Mahkamah mempunyai kuasa untuk masuk campur dalam sesuatu perintah persetujuan jika dengan mengekalkan perintah tersebut akan menyebabkan ketidakadilan yang melampau. Telah menjadi undang-undang bahawa sesuatu perintah persetujuan boleh diketepikan bukan sahaja atas alasan fraud tetapi juga atas alasan-alasan yang sama di mana sesuatu perjanjian boleh diketepikan. Satu-satu kehendak utama sesuatu kontrak adalah bahawa pihak-pihak terbabit telah mencapai persetujuan yang melibatkan satu tawaran dan penerimaan tawaran tersebut. Dalam kes ini, pemegang serahhak tidak pernah mencapai persetujuan sedemikian dengan kesemua pihak-pihak kepada perjanjian penyelesaian keluarga yang bermaksud untuk melupuskan kepentingan benefisialnya tanpa pengetahuan dan persetujuannya. Dengan itu, bukan sahaja perjanjian tersebut tidak mengikat pemegang serahhak kerana beliau bukan merupakan pihak kepada perjanjian, tetapi ia juga cuba untuk melupuskan kepentingannya, yang disokong secara jelasnya oleh kekuasaan perintah persetujuan Mahkamah. Perjanjian keluarga tersebut, dengan itu telah mewujudkan satu situasi ketidakadilan yang melampau terhadap pemegang serahhak. Perjanjian penyelesaian keluarga itu, dalam keadaan sedemikian, haruslah diketepikan.

**[11]** Walauapapun yang diperkatakan di atas, dalam halkeadaan di sini, pengenepian perjanjian penyelesaian keluarga tersebut menghadapi halangan yang serius disebabkan fakta bahawa, selaras dengan perintah

persetujuan yang dikeluarkan oleh Mahkamah, Tan Chong telah membeli dan telah pun didaftarkan sebagai tuanpunya EMR 5614 walaupun dalam keadaan yang sangat kontroversial. Perintah persetujuan, jika diketepikan, akan menyebabkan kemudaratan kepada Tan Chong. Dengan itu, sementara perjanjian penyelesaian keluarga tersebut harus diketepikan tanpa apa-apa keraguan, keadilan kes menghendaki supaya bahagian dalam perintah persetujuan itu yang memberikan kebenaran untuk menjual EMR 5614 seharusnya dikekalkan. Ini adalah juga selaras dengan prinsip bahawa pentadbir mempunyai hak esklusif untuk memutuskan bagi menjual ataupun tidak menjual mana-mana tanah dalam menjalankan tugas pentadbirannya.

**[12]** Bahagian pemegang serahhak sebanyak 81/630 bahagian itu telah tidak dipertikaikan oleh pihak-pihak yang lain. Mahkamah dengan itu akan menerima bahagian ini sebagai betul dan relief sehubung dengannya adalah diberikan. Sesebuah Mahkamah bagaimanapun, boleh memberikan relief-relief lain jika sesuai dengan kehendak keadilan kes. Oleh hal yang demikian, dalam keadaan di sini, perintah-perintah lain yang sewajarnya haruslah juga dibuat.

*[Rayuan dibenarkan sebahagiannya. Perintah-perintah berbangkit yang wajar dibuat]*

**Cases referred to:**
*Aberfoyle Plantations Ltd. v. Khaw Bian Cheng [1960] MLJ 47, PC* ***(refd)***
*Lord Sudely & Ors. v. Attorney General [1897] AC 11* ***(refd)***
*Dr. Barnado's Homes Natonal Incorporated Association v. Commissioners For Special Purposes of the Income Tax Acts [1921] 2 AC 1* ***(refd)***
*Lee Ah Thaw v. Lee Ah Thaw v. Lee Chun Tek [1978] 1 MLJ 173* ***(refd)***
*Law Hap Lien v. Henry Lo [1983] 1 MLJ 381* ***(refd)***
*Woon Kim Poh v. Sa'amah bt Haji Kasim [1987] 1 MLJ 400* ***(affd))***
*Eng Mee Yong & Ors. v. V Letchumanan [1979] 2 MLJ 212* ***(foll)***
*Lim Yoke Foo v. Eu Finance Bhd. [1982] 2 MLJ 37****(refd)***
*Rose Hall Ltd. v. Reeves [1975] AC 411* ***(refd)***
*Huddersfield Banking Co. v. Lister [1895] 2 Ch 273* ***(foll)***
*Marsden v. Marsden [1972] 2 All 1162* ***(foll)***
*Cargill v. Bower [1879] 10 Ch D 508* ***(foll)***

**Legislation referred to:**
Civil Law Act 1956, s. 4(3)
Distribution Act 1958
Law of Property Act (UK) 1925, s. 136
National Land Code, ss. 322(2), 340, 432
Probate and Administration Act 1956, s. 60

**Other source referred to:**
*Law of Contract,* Cheshire, Fifoot & Firmston, 11th Edn., p. 498

*For the appellant - Wong Chong Wah (Ambiga Sreenevasan with him); M/s. Skrine & Co.*

*For the respondents Nos. 1 to 10 except respondent 9 - Wong Chok Meng (Shereena with him); Syarikat Ng Kok Thoy*

*For respondent No. 9 - C. V. Das (Romesh Abraham with him); M/s. Shook Lin & Bok*

**JUDGMENT**

**Peh Swee Chin FCJ:**

This appeal focuses on the validity of some assignment of some beneficial interest in an intestate's estate, the viability of a caveat the assignee lodged against the immovable assets of the estate and the effect of a Court's order that deals with such assets without reference to the said purported assignment.

It will be necessary to set out briefly, the rather long and complicated facts of this case.

The plaintiff/appellant claims that by virtue of two agreements read together constituting, an assignment made by one Yap Ah Looi (f), (hereinafter called the assignor) and the plaintiff/appellant, (hereinafter called the assignee), the assignor sold, transferred, assigned to the assignee all her interests, rights, benefits and claims respectively in the estates of her father, Yap Cheng deceased, (hereinafter the deceased father) and her mother, Ng Cheng Kim deceased, (hereinafter the deceased mother) for the price of RM15,000. The said agreements dated 1 April 1964 and 20 January 1965 are set out below in full:

> THIS DEED OF ASSIGNMENT is made this 1st April, 1964 between YAP AH LOOI @ YAP AH LAY of 60D off Campbell Road, Kuala Lumpur (hereinafter called the Assignor) of the one part, and KHAW POH CHHUAN of Kuala Lumpur (hereinafter called the Assignee) of the other part.
>
> WHEREAS the assignor is one of the co-administrators of the Estate of Yap Cheng alias Yap Ching (deceased).
>
> AND WHEREAS the said Yap Cheng (deceased) died intestate on this day of 20 December, 1943, in the Federation of Malaya leaving surviving him the following persons:
>
> (1) Ng Cheng Kim (f) widow since deceased.
>
> (2) Ong Keow (f) widow since deceased.
>
> (3) Yap Ah Looi (the Assignor)
>
> (4) Yap Vui Kor
>
> (5) Yap Ban Ler

(6) Yap Ban Lee

(7) Yap Ban Chuan

(8) Yap Hong Chu

(9) Yap Chin Toh

AND WHEREAS the Estate of Yap Cheng (deceased) consists of among other things moveable and immovable properties and several investments specified in the schedule annexed hereto (hereinafter called the said property).

AND WHEREAS the Assignor is entitled to a share in the said property under the estate of Yap Cheng (deceased) and a share under the estate of Ng Cheng Kim (deceased) in the said property.

AND WHEREAS the Assignor shall as soon as possible apply to the High Court. Kuala Lumpur to wind up the Estates of Yap Cheng (deceased) and Ng Cheng Kim (deceased) and to distribute the said property to the abovementioned persons entitled to the said property including the Assignee.

AND WHEREAS pending the winding up and distribution of the said property the Assignor hereby agrees to assign sell and transfer all her right, interests, benefits and claims of whatever nature legal or equitable in respect of her share in the said property under the estates of Yap Cheng (deceased) and Ng Cheng Kim (deceased) to the Assignee free from all encumbrances for the sum of $15,000/-.

NOW THIS DEED WITNESSETH as follows:

1. In consideration of the sum of $6000 (Dollars six thousand only) now by the Assignee to the Assignor (the receipt of which sum the Assignor hereby acknowledges) the Assignor hereby sells, transfers and assigns all her interests, rights, benefits and claims whether legal or equitable in the estates of Yap Cheng (deceased) and Ng Cheng Kim (f) (deceased) to the Assignee absolutely free from all encumbrances at the price of $15,000/- (Dollars fifteen thousand only).

2. The balance sum of $9000/- shall be paid by the Assignee to the Assignor on or before 31st March, 1965.

3. The Assignor undertakes to take all reasonable steps and actions to apply for Letters of Administration to the estate of Ng Cheng Kim (f) (deceased) and to wind up the affairs of the estates of Yap Cheng (deceased) and Ng Cheng Kim (f) (deceased) and to distribute the assets to the above beneficiaries excluding the Assignor but including the Assignee.

4. The Assignor undertakes to authorise any persons including the Court and the administrators to make payments in respect of her share under the estates of Yap Cheng (deceased) and Ng Cheng Kim (deceased) to the Assignee absolutely. Such authority shall be deemed to be irrevocable.

5. The Assignor agrees irrevocably to lend her name to the Assignee for taking whatever necessary steps and actions under the estates of Yap Cheng (deceased) and Ng Cheng Kim (deceased) against any persons for accounts collecting assets, winding up the said estates and distributing the said property.

6. The Assignor shall not take steps or actions which will be prejudicial to the interests and tights of the assignee. Prior to taking any step and action the Assignee agrees that he must first get the prior written consent of the Assignee for doing so.

7. The Assignor shall sign or affirm all documents, plans, applications, cheques and papers at the request and cost of the Assignee in order to effectuate the terms and objects of this Agreement.

8. Upon receipt of any documents, notices, cheques and other payments in respect of the estates of Yap Cheng (deceased) and Ng Cheng Kim (deceased) the Assignor shall immediately hand over the same to the Assignee.

9. This assignment shall be binding upon the parties hereto, their respective heirs, administrators, executors, and the assigns.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands this and year first above written.

SIGNED by the ASSIGNOR )
in the presence of: ) Signed

Witness: Signed

SIGNED by the ASSIGNEE )
in the presence of: ) Signed

Witness: Signed

THE SCHEDULE ABOVE REFERRED TO:

(1) E.M.R. No 5614 Lot 4185

(2) E.M.R. No 4859 Lot 1035

(3) E.M.R. No 6048 Lot 3571

(4) E.M.R. No 4140 Lot 3572 all in the Mukim of Batu in the District of Kuala Lumpur

(5) Shares and stocks in the undertaking of Lian Seng Bus Co. Ltd. and profits and dividends

(6) Debts due to the estate of Yap Cheng (deceased)

Signed

Signed

AGREEMENT

THIS AGREEMENT is made this 20th day of January, 1965 between YAP AH LOOI alias YAP AH LAY (f) of No 60D, off Campbell Road, Kuala Lumpur (hereinafter called the Assignor) of the one part AND KHAW POH CHHUAN of Kuala Lumpur (hereinafter called the Assignee) of the other part SUPPLEMENTAL, to an Agreement dated the 1st day of April, 1964 made between the same parties in the same order (hereinafter called "the Principal Agreement").

WHEREAS under the Principal Agreement the Assignor has agreed to assign sell and transfer all her rights, interests benefits and claims of whatever nature legal or equitable in respect of her share in the immovable and movable properties specified in the Schedule annexed to the Principal Agreement under the estates of Yap Cheng deceased and Ng Cheng Kim (f) deceased to the Assignee free from all encumbrances for the sum of Dollars Fifteen Thousand ($15,000.00) only.

AND WHEREAS the Assignor has failed to take all reasonable steps and actions to apply for the Letters of Administration to the estate of Ng Cheng Kim (f) deceased and to wind up the affairs of the estates of Yap Cheng deceased and Ng Cheng Kim (f) deceased and to distribute the assets therein as stipulated under the Principal Agreement, thereby causing unreasonable delay.

AND WHEREAS the Parties, hereto have now further agreed as follows:

1. That the Assignor shall from the date hereof take active steps and act diligently to proceed in the application for administration of the estate of Ng Cheng Kim (f) deceased and to wind up the affairs of the estates of Yap Cheng deceased and to distribute the assets and execute a valid and registrable transfer of her share in the immovable property in favour of the Assignee or his nominee free from encumbrances.

2. That the Assignee shall upon execution of this agreement pay a further sum of Dollars Seven Hundred and Fifty ($750.00) only to the Assignor. The balance sum of Dollars eight thousand two hundred and fifty ($8,250.00) only shall be paid by the Assignee to the Assignor within two weeks from the receipt of a written notice that the orders for distribution of the estates of Yap Cheng deceased and Ng Cheng Kim (f) deceased are obtained and that the Assignor is in a position to execute a valid and registrable transfer of the Assignor's share in the immovable properties of the said deceased's estates and against the delivery, of the same and the relevant titles.

3. It is hereby mutually agreed that clause 2 of the Principle Agreement is hereby revoked and deleted.

4. This Agreement shall be binding upon the parties hereto, their respective heirs, administrators executors and the assigns of the Assignees.

IN WITNESS WHEREOF the parties hereto have hereunto set their hand the day and year first above written.

SIGNED by the said ASSIGNOR )
in the presence of: ) Signed

SIGNED by the said ASSIGNEE )
in the presence of: ) Signed

It will be noticed that the first of the two agreements was the purported assignment and the 2nd agreement, a supplementary agreement to the first agreement on the matter of a variation of the time of payment of the balance of purchase price.

The original administratrix of the estate of the deceased father was the deceased mother who died subsequently without completing the administration. Letters of administration *de bonis non* were granted subsequently in 1960 to the assignor and her co-administrator, one Yap Ooi Koh (10th defendant), a son of the deceased father (hereinafter called the co-administrator) and we may just as well add that the co-administrator was notified by the assignor of the purported assigment in question to the assignee.

At the time of the assignment agreement aforesaid and dated 1 April 1964, the assets of the deceased father comprised principally 4 pieces of land. The estate of the deceased mother consisted of a beneficial share in the estate of the deceased father as determined by the Distribution Act 1958, the deceased mother having been one of the two widows of the deceased father the other widow, one Ong Keow had also died by the time of the assignment agreement dated 1 April 1964 leaving her own 3 children who were parties to this appeal. The assignor herself had died in 1988.

At the date of judgment of the High Court below and before us, the 1st defendants have been and still are the administrators of the assignor, the 2nd, and 3rd defendants, the children of the deceased father by the said Ong Keow, the other wife of the deceased father; the 4th defendants, the administrators of yet another son, since deceased of the said Ong Keow (f): the 5th defendants, the administrators of the deceased father, the 6th, 7th, 8th and 10th defendants, the children of the deceased mother, and the 9th defendant Tan Chong & Sons Motor Company Sdn. Bhd., a purchaser of one of the 4 said pieces of land of the estate of the deceased father, (hereinafter called Tan Chong).

In 1965, the assignor filed Originating Summons No. 186/1965, asking for an order to distribute all the property of the deceased father. In the proceeding she admitted she had assigned all her beneficial interests in the estates of the deceased father and the deceased mother to the said assignee. As found by

the learned trial Judge, she was not keen to pursue the matter after filing the said originating summons which lay dormant for 5 years. It was withdrawn by her solicitors in 1970 on her indication to commence fresh proceedings which were not filed. In this connection, we might just as well add, that having regard to the common course of human conduct, the said originating summons must have been a matter of some great interest to all the other beneficiaries of the estates of the deceased father, deceased mother, or the other widow of the deceased father who must all have been aware of the assignment of the beneficial share of the assignor to the assignee as set out in the said originating summons or the assignor's affidavit in support of it.

The assignee took up residence in Australia and appointed 4 persons as his attorneys to act jointly, or severally by a duly registered power of attorney and one of such attorneys called Cheng Hong Jiun (hereafter the said attorney) lodged a caveat against the said 4 pieces of land of the estate of the deceased father as purchaser and assignee of the assignor's interests, rights, etc. in the estates of the deceased father and deceased mother.

On 11 June 1973, the children of the other wife of the deceased father, being 2nd, 3rd and 4th defendants filed what appears to be an administration action by Originating Summons No. 209/73 in the High Court Kuala Lumpur against the assignor and her co-administrator of the deceased father's estate and 3 children of the deceased mother, being 6th, 7th and 8th defendants as respondents, claiming accounts, distribution of assets as provided by law of intestacy of the estate of the deceased father etc. In reply, the assignor and her co-administrator stated their willingness to distribute assets according to Distribution Act, 1958, the proceeds of sale of the remaining assets of the deceased father etc. It is significant that the name or connection of the assignee to the estate of the deceased father this time round were not mentioned by the assignor and the said co-administrator. They further and later exhibited a family settlement agreement of all the beneficiaries or children of the deceased father, and such agreement does not contain any mention of the assignee.

The family settlement agreement provided for the sale of 3 pieces of lands of the deceased father *viz.* EMR 4859, EMR 6048 and EMR 4140 to be sold in equal shares to 6th, 7th, 8th and 10th defendants four of the children of the deceased father at the price of RM2 p.s.f. but the price payable would be treated as having been paid by them by adjusting the value of their distributive shares in accordance with the Distribution Act, 1958 to be dealt with further as follows.

One of the said 4 pieces of land would be sold to the said Tan Chong at the price of RM6.50 p.s.f. and the proceeds of sale would be distributed according to Distribution Act, 1958 to the children of the deceased father, and in so far as the shares (to such proceeds) of the 6th, 7th, 8th and 10th defendants, i.e. the would-be transferees of the other 3 pieces of land, the shares of such

proceeds payable to them were to be adjusted with the price or the value of the 3 other pieces of land on the basis of RM2 p.s.f. as stated above.

The plaintiffs in the administration action i.e. (Originating Summons No. 209/ 1973) confirmed the said family agreement and asked for a consent order in terms of the said family settlement agreement which had totally brushed aside any interests of the assignee. A consent order thus was made on 24 December 1973 by the Court without any awareness of the interests of the assignee.

The assignor thereafter sought to settle the matter with the assignee by agreeing to refund the sum of RM6,750 received by her so far and to pay further damages in the sum of RM30,000. The settlement aborted on the assignor's failure to agree on one outstanding term i.e. that the total sum of RM36,750 was to be paid first to the assignee's solicitors as stakeholders **before** the assignee withdrew his caveat against the said 4 pieces of land; a consequence of mistrust between each other.

Battle lines thereafter continued to be drawn between the assignee and the assignor. The assignor and her co-administrator applied to the Registrar of Titles, Federal Territory for the removal of the assignee's caveat with the address of the assignee stated as: "c/o 84, Kg. Jamil Rais, Sungai Way, Kuala Lumpur" by form 19C of the National Land Code, and the said form was sent to the Land Administrator, Petaling Jaya for service. It was not served on the assignee by the Land Office at Petaling Jaya on the ground of no name of road or street being given. The said Form was issued again for the publication in the gazette by way of substituted service under s. 432 of the National Land Code (hereafter the said Code) with copies to be posted at the said lands etc. There was no record of posting on the said lands and that the fact of purported removal of the said caveat was not also endorsed on the register documents of title of the 4 pieces of land.

Pursuant to the consent order made on the Originating Summons No. 209/ 1973, which also granted leave to sell one of the said 4 pieces of land, i.e. EMR 5614, (which was not among those to be transferred to certain children of the deceased father), the assignor and her co-administrator entered into an agreement to sell the land EMR 5614 to the said Tan Chong, at the price of the RM16.50 p.s.f. totalling to RM990,990 which was reduced to RM900,000 for the benefit of the said Tan Chong as a result of the take-over by the Dewan Bandaraya Kuala Lumpur of part of' the land under the said EMR 5614 to the detriment of the said Tan Chong.

The transfer in favour of the said Tan Chong in respect of EMR 5614 was duly registered on 23 December 1977 while the caveat endorsement remained on the register uncancelled as stated above.

The assignee came to know about this and through his solicitors wrote and protested to the relevant Land Administrator, the assignor and the said Tan Chong, asking for the transfer to the said Tan Chong to be cancelled.

Not getting the desired response from the parties the assignee wrote to, the assignee filed the present action concerned in this appeal, claiming various declarations eg. that the said consent order and the family settlement agreement were invalid; that he was entitled to 81/630 undivided share in each of the said 4 pieces of lands etc. and in effect for all necessary consequential orders and directions for the assignee to be so registered as such a part owner of the said lands etc.

The action was described by the learned trial Judge in a long and apparently careful judgment which has been severely criticised before us on appeal.

From the memorandum of the appeal, it is crystal clear, that the assignment by the assignor to the assignee in respect of the assignor's rights and interests in the estates of both the deceased father and the deceased mother is the most important issue. The said assignment was held by the learned trial Judge to be void and invalid for various reasons which will be presently looked into, and in doing so, it is necessary to set out s. 4(3) of the Civil Law Act**,** 1956 on which the learned Judge seems to have relied to an unjustified extent. The said s. 4(3) reads:

> Any absolute assignment by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been, entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

The first reason of the learned trial Judge for holding the assignment in question to be invalid is that the assignment was said to be non-absolute or conditional. According to the learned Judge, the assignment would take effect after the assignor had applied for letters of administration of the deceased mother's estate; that the share of the assignee could not be paid to the assignee unless the assignor authorised it, that the said assignee could not take any action by using the name of the assignor; that the assignor could not give valid discharge to the administrators of the estates of the deceased father and deceased mother and that balance sum of the price payable by the assignor to the assignee would be paid only after the necessary orders for distribution of the two estates were obtained.

We do not agree.

Looking at the two agreements dated 1 April 1964 and 20 January 1965 respectively, the fact that the latter agreement is supplementary to the earlier agreement has never been in dispute among the parties. To determine if the assignment is conditional or absolute, the test of an absolute assignment should normally be only that it is one by which the entire interest of the assignor in the chose in action (such as the interest as claimed by the assignee herein) is, for the time being transferred unconditionally to the assignee and placed completely under the assignee's control. Therefore, on a true construction of the agreements, the question is this, was the beneficial interest of the assignor in the estates of both the deceased father and the deceased mother transferred unconditionally, to the assignee? If the answer is affirmative, the assignment is absolute.

By far, the most important clause is clause 1 of the agreement dated 1 April 1964, set out above earlier. Clause 1 states that on the payment of RM6,000 to account of the price of RM15,000 the assignor sells, transfers and assigns all her interests, rights etc. to the assignee absolutely and free from all encumbrances. A fair reading of clause 1, and nothing more will lead to the inevitable conclusion that such interests and rights etc. pass absolutely under this clause and such passing of such interests etc. are not dependent on other terms of this agreement or for that matter, both agreements have no term of any kind that really makes such passing of such interests etc. conditional as will be seen.

The rest of the terms of both agreements must then be looked into. None of such terms could function as a condition precedent, of the type one met in *Aberfoyle Plantations Ltd. v. Khaw Bian Cheng* [1960] MLJ 47, PC in which the purchase of the land was conditional or contingent on the obtaining of "renewal" of the leases, i.e. the purchase agreement was a contingent contract. Neither any of such terms functions as a condition subsequent, e.g. that the assignment is to terminate upon the occurrence of some event. None of such other terms will, in any other way, amount to a fundamental stipulation i.e. a condition for the purchase of the beneficial interest, the breach of which would entitle an innocent party to treat the contract for the said purchase as at an end. These other terms, (i.e. terms other than the said clause 1) may, in our view, either amount to terms of the type the breach of any of which entitles one to a mere claim for damages only or they may equally amount, by their nature, to words of expectation which do not form any actual part of the contract of the said purchase. For the purpose of this case, it is not necessary to decide as to which category of the two such other terms will amount to.

We are therefore of the view that the assignment is absolute and not conditional.

Since it is absolute and is also in writing and notice of the assignment had been undoubtedly given to the debtors i.e. the administrators of the estate of the deceased father *viz.*, the assignor in her other capacity as one of the administrators and her co-administrator, s. 4(3) of the Civil Law Act has been complied with, contrary to the ruling of the learned Judge. In any event, compliance with s. 4(3) is not a pre-requisite to the validity of an assignment which is to be determined in the usual ways. Even without complying with the said s. 4(3) e.g. even without notice of the assignment to such debtors, for the sake of argument, the assignment would have been valid in equity in any event against the assignor.

The learned Judge appears to be in error in suggesting as if there were 2 different distinct kinds of assignment, i.e. one in equity and one under s. 4(3) of the Civil Law Act, 1956, both assignments being mutually exclusive. Nothing is further from the truth. If an assignment is valid in law or legal (i.e. legally binding on the assignor), then it is valid or legal and compliance of s. 4(3) is not essential to make it valid or legal as stated. Section 4(3) has not made any alteration in the law of assignment; it has merely made it easier for the assignee in one aspect in that the assignee can sue in his own name without sometimes having to borrow the name of the assignor or if the assignor is uncooperative, to join the assignor as a co-defendant. It is instructive to read the observation and conclusion of Professor Firmston's 11th Edition of Cheshire, Fifoot & Firmston's *"Law of Contract"* at page 498 in regard to s. 136 of England's Law Property Act, 1925 which is in *pari materia* with our s. 4(3): "The statute has not altered the law in substance. It is merely machinery. It does not confer a right of action which did not exist before but enables the right of action that has always existed to be pursued in a less roundabout fashion".

The learned Judge appears again to have held also that the assignment was void because both the agreements giving rise to the assignment were themselves void in turn because the agreements were said by the learned Judge to create an uncertainty. It was not at all certain that the assignor would be the one acceptable to the other beneficiaries for applying for letters of administration to the estate of the deceased mother. We are unable to agree, please see our reasoning earlier, especially about terms which may appear to be words of expectation or terms which are not fundamental stipulations etc.

Both the agreements were said again to be void also for being uncertain by virtue of s. 60 of the Probate and Administration Act 1956, in that the assignor did not join, in the assignment agreement, the deceased father's estate which was represented by two administrators, *viz.* the assignor (when she wore the other hat) and her co-administrator. Further, the assignor would have to apply for leave to sell the interest in the 4 pieces of lands to the assignee and whether such leave would be granted or not would be also uncertain. The

learned Judge apparently accepted learned Counsel's submission in coming to this conclusion which cannot be upheld for the same reasoning of ours earlier as referred to also in the preceding paragraph.

Quite apart from our view as to the passing of interest by virtue of clause 1 of the agreement of 1964 aforesaid, and as to the nature of the rest of the clauses, the subject-matter of the assigment is a chose in action and not the lands as such, therefore the agreements in question cannot be treated in law as agreements to buy and sell land or parts of such land, more about this later in connection with the ruling of the learned Judge that the assignee had no cause of action against the defendants, when we will discuss about a residuary beneficiary having no interest, legal or equitable, in the lands or assets of a residuary estate.

We therefore hold that the assignment is valid or rather the assignment is not invalid by reason of uncertainties mentioned by the learned Judge.

The next conclusion of the learned Judge appears to be, if we summarize correctly, that the assignee had no cause of action against the respondents in this appeal.

The lack of a cause of action was said to be due to the fact that the assignor was in no position, as on 1 April 1964 when the assignment was made to assign any part of the assets of the estate of the deceased father to the assignee, because, the assignor as a "residuary legatee" had no interest, legal or equitable in the assets of the residuary estate which she could dispose of. Strictly speaking and in passing, no will was made by the deceased father and a legacy is usually given by a will, we think that the "residuary legatee" spoken of was meant to mean a residuary beneficiary.

The assignee only has what the assignor had. Therefore the assignee is indeed, in effect, a residuary beneficiary of the estates of both the deceased father and the deceased mother, he having stepped into the shoes of the assignor. The observation of the learned Judge is therefore quite right to the effect that the assignee, as a residuary beneficiary, has only a right to have the residuary estate of the deceased father properly administered, and applied for his benefit after the administration is completed, and such residuary beneficiary until the administration is completed, has no interest, legal or equitable in any of the assets of the estate of the intestate. When administration is complete or completed, the nett residue, which usually but not always, comprises cash, is the divisible among the residuary beneficiaries, if more than one, in other words, a beneficiary, can claim immediately, his share of such divisible residue at that stage.

The position of a residuary beneficiary with regard to the assets of an intestate, as stated above, is indeed supported by rather impeccable authorities *viz. Lord Sudely & Ors. v. Attorney General* [1897] AC 11, *Dr. Barnado's Homes*

*National Incorporated Association v. Commissioners For Special Purposes of the Income Tax Acts* [1921] 2 AC 1, *Lee Ah Thaw v. Lee Chun Tek* [1978] 1 MLJ 173, *Law Hap Lien v. Henry Lo* [1983] 1 MLJ 381.

For explaining further the expression, "until the estate is fully administered"; we think that it is fully administered after the administrator has satisfied all testamentary expenses and debts, (and in the case of a deceased person dying estate, in addition, all legacies and bequests etc.,) and before the satisfaction of expenses etc., the residuary beneficiary cannot yet point to any particular asset or land comprised in the estate and claim his share in it. Until the administration is completed, the administrator can, e.g., select any particular asset for selling for paying debts and employ any other legitimate method of administration. The administrators can, of course, determine the form of residue that can be divided among the residuary beneficiaries when the administration is completed, such form of residue may consist of specific lands.

For better understanding "the claim to have the property property administered", it means a beneficiary can, after all persuasion falls, file an administration action asking for accounts and for steps to bring the administration to its completion etc. The said consent order mentioned earlier was in fact made on such an administration action i.e. Originating Summons No. 209/1973 mentioned above which was filed by some of the children of the deceased father. Thus the assignee in the instant case could have filed such an originating summons himself if he had wanted to do so. If he did, to say he had no cause of action would hold no water. But here, he filed the action for the Court to declare the said consent order and the said family settlement agreement void and for various reliefs including his claim to his rightful share to the proceeds of sale paid by the said Tan Chong as an alternative prayer etc. Did he have a cause of action on filing the present action?.

We think he had. When the assignee filed the present action, the administration can be said to be completed with the estate being distributed, as done by the administrators of the deceased father, according to respondents, in accordance with the family settlement agreement subject to leave of Court, purportedly signed by all beneficiaries or their personal representatives as the case may be, in the manner described earlier with a provision for one of the 4 pieces of land to be sold to the 9th respondent, the said Tan Chong. The proceeds of sale to the said Tan Chong would be distributed among the beneficiaries in the manner described. At the time of filing the action, he was in a position to claim a share of part of the residue, i.e. the said proceeds of sale and the lands to be specifically given to residuary beneficiaries in satisfaction of claims of residuary beneficial shares, and this was so even if he has claimed a lot more other reliefs, and at such time of filing, the nett residue had already been ascertained as comprising the 3 of the pieces of land to be given to those specific beneficiaries in satisfaction, and the proceeds of sale receivable from the said Tan Chong.

We next deal with the caveat lodged by the assignee and the conclusion of the learned Judge that it was invalidly registered.

It will be remembered that the caveat remained, glaringly, on the register when the memorandum of transfer to the said Tan Chong was presented for registration. The said transfer was registered, *prima facie*, in violation of the caveat.

What ought to be the position with regard to the registration of a transfer in violation of a caveat on the register as happened in this case?

First, the assignee's Counsel submitted to the effect that there was no such thing as a void caveat in law and that the transfer in question was void because of the presence of the caveat.

The importance of the caveat in the said Code is too well known to all. To refresh our memory, very, briefly, Hashim Yeop A Sani, SCJ (as he then was) in *Woon Kim Poh v. Sa'amah bt Haji Kasim* [1987] 1 MLJ 400, 402, spoke thus:

> Coming back to our case, under s. 322 of the National Land Code so long as a caveat is in force registration, endorsement or entry on the register document of title of any instrument of dealing shall be prohibited. The effect of a private caveat expressed to bind the land itself is to prevent any, registered disposition of the land except with the caveator's consent until the caveat is removed. See also *Eng Mee Yong & Ors. v. V. Letchumanan.* A caveat freezes the register at least until the caveator has taken Court action to determine his claim - Judith Sihombing, page 589. In the Torrens system where registration is the very basis of the system the prohibition in s. 322(2) must be strictly complied with. In other words the Registrar is statutorily obliged to refuse the registration because to do so would be a violation of an expressed provision of the National Land Code.

Thus the Federal Court in *Lim Yoke Foo v. Eu Finance Bhd* [1982] 2 MLJ 37 remarked:

> The root principle of the Torrens system is that the Register should be a mirror of title and that a purchaser should not have to search beyond this title.

The question or submission that there is no such thing as a void caveat is at once difficult as it is intriguing. The only authority cited for the assignee is apparently an *obiter dictum* of Lord Wilberforce in an appeal from Jamaica in *Rose Hall Ltd. v. Reeves* [1975] AC 411, 420*:*

> One final argument may be mentioned. The respondent had, as has been stated, registered a caveat on 11 December 1967, with the Registrar of Titles, Jamaica. This, of course, had the effect of preventing any dealings with the land while it remained effective. The appellant's contention was that this caveat was void, since at the date when it was lodged, the appellant had no interest to protect; consequently the rights of the parties should be dealt with as if it had never existed. Their Lordships cannot accept this. In the first place the concept of a

> void caveat is novel and difficult to comprehend and was not explained by the appellant. A caveat is simply a fact - it may be justified in law or not - and whether it is either must be decided through the procedure laid down in the Registration of Titles Law. Even it, which appears probable, it could have been removed, prior to 22 August 1968, or subsequently it was not so removed.

Lord Wilbeforce mentioned about the concept of a void caveat being a novel one and difficult to comprehend and stated the concept was not explained by the appellant who raised it in the Judicial Commttee. We are in the same boat as Lord Wilberforce about the lack of any such explanation but his Lordship was in a slightly more comfortable position in that the lodging of the caveat, (including its subsidiary question of a void caveat), had no bearing on the central issue in the cited case due to the commencement of some intervening legislation. His Lordship, unfortunately for us, only had to say very briefly as quoted above.

To the argument there in the cited case that there were no interests to protect and therefore the caveat in the quoted case should be treated as if it had never existed, his Lordship there could not accept this proposition. Whether it was justified in law or not must be decided through the procedure in (Jamaica's) Registration of Titles Law, and that even if it was probable it could be so removed. it was not removed. It would not be off the mark for us to say that the removal procedure spoken of i.e. Jamaica's Registration of Titles Law must be the corresponding procedure of removal in the said Code.

The implication of the quoted passage above is indeed there is no such thing as a void caveat unless it is removed in accordance with the procedure provided both for its creation and removal in the said Code. Let us discuss it briefly from various angles.

It would indeed bring anarchy to the Torrens system of land registration if anybody, without applying to remove a caveat in accordance with the established procedure, could argue it is void whenever he sees it fit to raise it in any proceeding laterally, thus undermining a caveat's efficacy and a pillar of strength of the Torrens system.

We have gone through a large number of cases, there could be, but we have found no cases where a caveat was allowed to be challenged as being void without the invoking of procedure for its removal or its continuation involved at the same time in these cases. Thus this large number of cases would seem to give support to the requirement for its removal in accordance with the procedure laid down, before one could speak of the voidness of such a caveat, and the express provision of such procedure in the said Code, in itself, is also eloquent testimony of such requirement.

One begins to realise at the same time on the other hand, the complete ease with which anyone can lodge a caveat, even with nothing in mind but a resolve to delay or even to annoy a would-be caveatee.

But Lord Diplock in *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212 prefacing his comments in detail on the procedure for removal or continuing of caveat in accordance with the said Code, seems to allude to the speediness of such procedure by saying:

> Unless there were some speedy procedure open to the registered proprietor to get the caveat set aside in cases where the caveator's claim is baseless or frivolous or vexatious, the Torrens system of land registration and conveyancing, so far from giving certainty to title to land in Malaya, would leave the registered proprietor in a more precarious position as respects his powers of disposition of his land than an unregistered proprietor under English law.

The description of speediness is well-deserved if compared with the need to adjudicate on the issues of complexity, normally, of the underlying impugned transactions between the parties in litigation, a great part of which one can steer clear in applying for the removal of a caveat.

For the reasons given we conclude that the question of any validity or voidness of any caveat can only be raised in proceedings in accordance with the procedure of the said Code for its removal or continuance, in other words the validity of such caveat can only be challenged in the proceedings instituted for the purpose in accordance with the procedure laid down in the said Code.

What then is the effect of a dealing registered by the registering authority in violation of the caveat on the Register? The Federal Court case of *Woon Kim Poh, supra*, is directly relevant. In that case, a consent order of the Court in question there mentioned the removal of 3 caveats, but the Registrar of Titles registered certain transfers of land in violation of another caveat not mentioned in the consent order. He had misread the order, so he claimed. The Court held in that case that the new registered proprietor who emerged on the register in violation of the caveat could not rely on s. 340 of the said Code in regard to the indefeasibility of title and any aggrieved person could appeal against such act, or omission of the Registrar within 3 months beginning with the date the decision was communicated to him. It was held that s. 340 must be read with other sections of the said Code; for that matter it goes without saying that the transfer in violation of the caveat can undoubtedly be challenged with a view to having the transfer set aside.

Despite the great importance of the caveat in the system, the ratio of *Woon Kim Poh* is that a transaction duly registered in violation of a caveat, is only without the protection of indefeasibility of title that would have been normally acquired; and be it noted that it carries with it a clear implication that such a transfer is not wholly *void ab initio* by virtue of the said violation but "voidable" in proceedings instituted for the purpose.

In *Woon Kim Poh's* case, the caveator applied by motion for setting aside certain transfer of some land registered by the Registrar of Titles in violation of the caveat still in force on the register. The caveator had lodged the caveat

so that she could claim a transfer of the land in question to herself from the registered owner in accordance with some agreement between them. The registered owner transferred it to one Woon and the transfer was registered by the Registrar of Titles in violation of the caveat. On the motion against Woon by the caveator, the learned Judge in the High Court set aside the transfer against Woon. The merits of Woon, if he had any, were not touched on by the learned Judge except on the mere facts of the existence of a caveat and a transfer registered in violation of it. The decision of his Lordship was upheld by the Federal Court. It is interesting to note that on setting aside the said transfer, the dispute between the cavcator and the caveatee had from all appearances remained yet to be resolved bv the Court. We affirm once more the decision of *Woon Kim Poh* case.

Therefore it logically follows that the *status quo* before the presentation of the transfer in violation of the caveat should be restored *ex debito justitiae* on the mere fact of such violation on a motion to Court without the necessity to explore the underlying transaction between the parties.

What happens, however, if the caveator, instead of moving the Court for any transfer registered in violation of his caveat (prior to the determination of the rights of both caveator, caveatee and the transferee), to be set aside *ipso facto*, asks the Court to adjudicate on the respective merits of the caveat, and of all parties, including the caveator and the transferee as happened in this case?

Then the Court will determine the issues bearing on such merits and make the necessary orders as the justice of the case requires, such order being supportable in principal or on authority and also such orders may include the order for removal of the caveat.

Accordingly we have dealt with the issue of the assignment the validity of which we have earlier upheld. We now deal with the issue of the said consent order, which is set out below.

ORDER

UPON READING the Originating Summons herein dated the 14th day of June 1973 and the joint Affidavit of Applicants jointly affirmed on the 8th of June 1973 and the joint Affidavit of the 1st and 2nd Respondents jointly affirmed on the 22nd day of December 1973 all filed herein AND UPON HEARING Mr B.G. Martin of Counsel for the Applicants and Mr Sidney Augustin of Counsel for 1st Respondent and Mr Shee Koon Ruay of Counsel for the 2nd, 3rd, 4th and 5th Respondents BY CONSENT IT IS ORDERED that the Application of the Applicants for Accounts be and is hereby withdrawn AND BY CONSENT IT IS FURTHER ORDERED that the application of the 1st and 2nd respondents for leave be and is hereby, granted to:

(i) transfer the lands under EMR No 4859 for Lot No 1035, EMR No 6048 for Lot No 3571 and EMR No 4140 for Lot No 3572 to 2nd, 3rd, 4th and 5th Respondents in equal shares free from incumbrances at $2/- per square foot as agreed and the value of such equal shares to be off-set as part-payment against the shares due to them from the estate of Yap Cheng alias Yap Ching, deceased, and the estate of Ng Cheng Kim (f) (deceased) the deceased's first widow;

(ii) sell the land held under EMR No 5614 for Lot No 4185, by private treaty at a price of not less than $6.50 per square foot as agreed and to distribute the net proceeds of sale thereof to the applicants and respondents proportionate to their shares as per paragraph 10(a), 10(b) and 10(c) of Affidavit of the 1st and 2nd Respondents affirmed on 22nd day of December 1973 filed herein taking into account part-payment effected to the 2nd, 3rd, 4th and 5th Respondents pursuant to paragraph (i) above.

AND BY CONSENT IT IS LASTLY ORDERED that there be no Order as to Costs.

Given under my hand and the seal of the Court this 24 the day of December 1973.

Signed
Senior Assistant Registrar,
High Court, Kuala Lumpur

The complaint of the assignee before us is that the said consent order is not valid and in effect he asks this Court to brush it aside, *inter alia*, to have his name registered as a part owner ol the 4 pieces of lands pursuant to the assignment. An order of a superior Court is always deemed to be valid and must be obeyed until it is set aside in proceedings commenced for the purpose of setting it aside. Bearing this in mind if the assignee is to succeed, the said consent order would have to be set aside.

It is well established that a perfected consent order can only be set aside in a fresh action filed for the purpose, See eg. *Huddersfield Banking Co. v. Lister* [1895] 2 Ch. 273. The said consent order was given in Originating Summons No. 209/1973. It is now sought to have it set aside in the subsequent and separate civil suit concerned in the instant appeal. The civil suit is of course the said fresh action for the said purpose of setting aside the consent order.

The next question that arises naturally is that with regard to the relief of setting aside the consent order, seeing that he was not a party to the said originating summons in which the consent order was made, can the assignee claim such a relief?

In our view, the assignee should have been made a party in the the said family settlement agreement and in the said originating summons in place of the assignor who deliberately disowned the assignment. All the other parties were aware of the assignment because of another previous originating summons

which was filed for distribution of the assets of the deceased father in accordance with the Distribution Act, 1958. All such parties chose to treat the assignee as non-existent and to dispose of the interest of the assignee without his knowledge and consent. We therefore hold that the assignee has the *locus standi* to claim the relief of setting aside the said consent order.

Then, one would have to deal with the merits of such a claim of such relief more deeply.

A consent order is an order of the Court carrying out an agreement between the parties. It used to be thought at one time that only a ground of fraud could cause a consent order to be set aside. It is now well settled that a consent order can be set aside on the same grounds as those on which an agreement may be set aside, see e.g. again the *Huddersfield Banking Co. supra*.

It is elementary, that the first requisite of a contract is that parties should have reached agreement which would involve an offer and acceptance of the offer, *inter alia*. The assignee had never reached such agreement with all the parties to the family settlement agreement and the family settlement agreement purported to dispose of his beneficial interest without his knowledge and consent. Thus, not only that the family settlement agreement is not binding on the assignee because he was not a party to it, but it also attempted to dispose of his interest by the agreement, to be backed by the sanctity of a consent order of the Court too. A situation of grave injustice was thus caused to the assignee by the family settlement agreement and based on it, the said consent order which was sought to be set aside. We cite below a case which we approve and adopt in this connection.

Thus in *Marsden v. Marsden* [1972] 2 All 1162, in a divorce case, Counsel for the wife agreed to a consent order for her to release her charge on the matrimonial home and to be paid maintenance for herself and her children. All these were contrary to her express instructions, and this was unknown to Counsel for the husband. On the **same** day the consent order was extracted, either contemporaneously or some time before, the wife applied to set aside the consent order. It was set aside by the learned Judge holding or approving the proposition that in such cases, the Court had power to interfere in setting aside the consent order for in the circumstances, grave injustice would be done by allowing the compromise to stand, although the limitation of Counsel's authority was unknown to the other side. By the way, this case in another way seems to be an exception on its own facts to the rule that a consent order, when perfected, can only be set aside in a fresh action, and not in the same action in which the consent order was made.

This case shows that even if lack of consent was unknown to the other side, the Court has the power to interfere with such a consent order where grave injustice would be caused by allowing the consent order to remain. This would

be relevant to a theoretical position in our case if we assume for the sake of argument that apart from the administrators of the deceased father, all the other beneficiaries were unaware of the assignment.

We therefore propose that the family settlement agreement and the consent order ought to be set aside except for a serious impediment to such proposed course of action which will be presently dealt with.

The impediment is that, pursuant to the said consent order, the said Tan Chong had bought and had itself registered as a proprietor of one of the said 4 pieces of land, albeit in highly controversial circumstances and the said consent order, if set aside, would cause prejudice to the said Tan Chong, when the said Tan Chong was entitled to and did accept the terms of the consent order without question as after all, even though a consent order is an order of Court carrying out an agreement between the parties, it has become a command from a Court of competent jurisdiction which should either be respected or obeyed.

While the family settlement agreement should be set aside undoubtedly for reasons given earlier but as regards the consent order, not only that justice of the case requires that that part of the consent order as providing for leave to sell that piece of land held under EMR 5614 at the price of RM6.50 per square foot ought to be retained, for reasons given in the preceding paragraph, but also it is quite justified on authority and in principle, when one bears in mind that it is the exclusive right of an administrator to decide to sell or not to sell any land in the course of his duty of administration of the estate of the deceased person in question and to apply for leave of Court to do so without any necessity to obtain any agreement or consent from any residuary beneficiary of the estate, including an assignee of the interests of a residuary beneficiary.

We therefor come to the conclusion that the family settlement agreement should be set aside, but that in regard to the said consent order, it should be set aside save expressly in regard to that part of the said consent order that granted leave to sell the said EMR 5614 at the price stated therein.

Since this part of the consent order is thus saved from going overboard, it should render the purchase of the said EMR 5614 by the said Tan Chong valid even if the transfer was registered in violation of the caveat as required by the justice of the case after this Court has heard and decided on the merits of various parties. In this connection we have indicated earlier that, in lieu of moving the Court for setting aside the transfer prior to the resolution of disputes among all the parties adverse to one another, the assignee chose to go the whole hog for a determination of rights inter se in a full action.

However the said Tan Chong pushed through the registration of the transfer without applying to Court to have the caveat first removed by the procedure as laid down in the said Code thus contributing and leading to much

acrimonious litigation. Such conduct should be disapproved and the Court's disapproval should be reflected in the matter of costs. For a registering authonity to ignore a caveat in registering any dealing, apart from this potential liability for heavy damages to any person prejudiced thereby, we do not see why, in appropriate cases, a Court should not recommend to the Public Services Commission with a view to having some action being taken though we do not propose to do so in this case in view of the lack of that blatantness of conduct which would normally prompt one to do so.

We ought to say a few words about another ground of learned Counsel for attacking the sale of the said EMR 5614 to the said Tan Chong i.e. that the purchase price of RM900,000 for it as paid by the said Tan Chong was less than the expected total amount of the proceeds of sale of RM990,900 calculated on the basis of RM6.50 p.s.f. as per the said consent order. Suffice it to say that the shortfall had been explained by the compensation payable in respect of the portion of land acquired by the City Council to build a public road. The ground is therefore without any merit.

We propose to make certain orders later, and it will be seen that these orders will be the orders that justice of this case requires but may not be the orders actually in terms as prayed for at the end of the statement of claim of the assignee, but we bear in mind that the Court can grant any relief as required by the justice of this case so long as such relief is not inconsistent with the reliefs that are expressly asked for see *Cargill v. Bower* [1879] 10 Ch D 508.

The assignee claims the entitlement of shares of the assignor which is a 4/42 (equal to 60/630) share as residuary beneficiary in the intestate estate of the deceased father, and a further 1/30, (equal to 21/630) share in the same intestate estate of the deceased father by virtue of the assignor's share in the intestate estate of the deceased mother who had been shown to have no assets of her own except her own share in the intestate estate of her husband as one of the two surviving widows. The claim is based on the Distribution Act, 1958 and the number of children and widows left by the deceased father are as enumerated by the learned Judge in the judgment. The total resulting share of the assignor in the intestate estate of the deceased father would be 81/630 share which of course has been sold and assigned to the assignee.

The assignee's proportion of 81/630 as such has not been seriously disputed or denied in evidence and also submissions by all the other parties, eg. no proportion other than this proportion has been suggested or put to the assignee at the trial while the assignor was giving evidence. The Court will accept this proportion as correct.

We therefore give judgment as follows:

(1) that the appeal of the appellant be allowed and the order of the High Court dated 16 May 1992 be set aside;

(2) that the consent order dated 24 December 1973 and made in Kuala Lumpur High Court Originating Summons No. 209/1973 be set aside save expressly in regard to its provision for granting leave to the 1st and 2nd respondents to sell the land under EMR 5614 for lot no 4185 by private treaty at the price of not less than RM6.50 per square foot:

(3) that the family settlement agreement annexed as exhibit 'A' to the affidavit of the administrators to the estate of Yap Cheng also known as Yap Ching deceased and filed in aforesaid Originating Summons No. 209/1973 be hereby declared as void and set aside;

(4) that this Court declares that the appellant is entitled to a 81/630 undivided share in the nett residue of the residuary estate of the estate of Yap Cheng @ Yap Ching deceased;

(5) that the transfer of EMR 5614 for lot No. 4185 Mukim of Batu, from the estate of Yap Cheng @ Yap Ching deceased to the 9th defendant above-named do remain on the register and is upheld;

(6) that the Court further declares that the nett residue of the residuary estate of Yap Cheng @ Yap Ching, deceased comprises EMR's 4859, 6048 and 4140 for lots 1035, 3571 and 3572 respectively all in the Mukim of Batu, District of Kuala Lumpur, and the proceeds of sale of land received from respondent No. 9 after deducting all expenses of sale;

(7) that all respondents except respondent No. 9, do forwith pay a 81/630 share of such proceeds of sale from the respondent No. 9 to the appellant, if such proceeds of sale have been paid to such respondents;

(8) that the 5th respondents do within one month from this order execute a valid and registrable transfer each in respect of an undivided 81/630 share in the said 3 pieces of land described in order 6 preceding this order in favour of the appellant, and at the same time, an undivided 549/630 of the same lands to the administrators of the estate of Yap Cheng @ Yap Ching deceased, at the expense and cost of the 5th respondents; the transfer of an undivided 549/630 share aforesaid at the same time being merely for compliance with s. 314 of the National Land Code which prohibits a transfer of part and not the whole of any land;

(9) that the said 5th respondents do deliver within one month from to-day to the appellant all documents of titles in respect of the said 3 pieces of lands mentioned in order 9 above together with a certified copy of or the original of letters of administration to the estate of Yap Cheng @ Yap Ching, deceased for enabling the appellant to present for registration the

said transfers in pursuance of this order and for their return to the 5th respondents after such use;

(10) that all the respondents, except respondent No. 9, do pay costs to the appellant to be taxed in default of agreement; such costs are not to be borne by the estate of Yap Cheng @ Yap Ching deceased;

(11) that there be no further order as to costs save as otherwise provided above in regard to the 9th respondent;

(12) that all parties be at liberty to apply for further directions, but only if necessary for implementing the orders herein.

Reported by W.A. Sharif